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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 838

COLOGERO FASULO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals in the above case may be found at page 169 of the Record, and also in 7 F. (2d), 961. (Advance pamphlet, No. 6, dated December 10, 1925.)

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered on September 14, 1925. (R. 174.) Motion for rehearing was made, entertained, and denied on October 19, 1925. (R. 175.) The jurisdiction of this Court to issue the writ prayed for is conferred by Section 240 of the Judicial Code as amended by the Act of February 13, 1925. (43 Stat. 936.)

STATEMENT

Petitioner was convicted under an indictment charging him and others with conspiring to violate Section 215 of the Criminal Code of the United States, viz, to devise a scheme or artifice to defraud and to use the mails in execution or attempted execution of such sheme. The scheme covered the attempt to extort money under threats of murder or bodily harm (R. 3); and petitioner's main contention here relied on as justifying the issuance of the writ prayed for, is that such a scheme is not within the reach of Section 215 of the Criminal Code of the United States, and also that there is a conflict among the decisions of the Circuit Courts of Appeals upon the point.

ARGUMENT

I

The judgment below is correct upon either of two grounds, viz, (1) that the threat under which petitioner attempted to extort money was false and was never intended to be carried out, in which event the case falls within the construction of Section 215 of the Criminal Code as contended for by petitioner, and the claimed conflict of decisions among the Circuit Courts of Appeals immediately disappears; and (2) assuming that petitioner intended to carry out the above-mentioned threat, the case is still one within the reach of Section 215, *supra,* under what should now be regarded as the settled construction of that section.

On the above two points the following is submitted:

1. The indictment charges that the defendants "would pretend that they intended to and would kill and murder the said Frank Lauricella, unless he, the said Frank Lauricella, would take and deposit at some designated time and place * * * the sum of two thousand dollars." (R. 5.)

The record evidence discloses that the only step taken by defendants to carry out their threat was to explode a bomb in the garage on the premises of Lauricella. (R. 42.) No attempt was ever made to inflict bodily harm upon the persons who were the subject of the threat. Moreover, petitioner testifying in his own behalf denied that he had entered into any agreement with any person to "get money from Mr. and Mrs. Lauricella." (R. 105.) He also offered evidence of good character. (R. 98 et seq.) The jury, from this and other record evidence, was justified in reaching the conclusion that while petitioner was directly connected with the sending of the threatening letters, he never intended to carry the threats into execution, but, as alleged in the indictment, they were pretended threats.

Viewed in the foregoing light, the case becomes typical and not exceptional, and the case of *Naponiello* v. *United States,* 291 Fed. 1008, cited to the contrary by petitioner, is not actually in conflict because not involving the falsity of the threat there dealt with.

2. Assuming *arguendo,* that the record permits the view that petitioner and his associates actually intended to carry out their threats, the judgment of conviction finds direct support in *Horman* v. *United States,* 116 Fed. 350; certiorari denied by this Court as reported in 187 U. S. 641.

But petitioner contends that the addition made to the language of old Section 5480 of the Revised Statutes, by Section 215 of the Criminal Code, and the comments made thereon by this Court in *Hammerschmidt* v. *United States,* 265 U. S. 182, 189, establishes that the ruling in the *Horman case, supra,* is no longer applicable. See present Petition, p. 13.

A careful examination of the *Hammerschmidt case, supra,* would seem to disclose no intimation by this Court that the statutory construction adopted in the *Horman case* has been in any wise upset by the addition made to the law in Section 215 of the Criminal Code. That Section now covers " any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.*" The words in italics are those which were added to the law by Section 215 of the Criminal Code.

Analyzing the contention of petitioner, if no scheme is covered by the statute except those involving trick, deceit, chicane, or overreaching, then the words added to the law by Section 215, *supra,* would have no field in which to operate, for the

language of the old statute would cover cases involving such characteristics. The words added to the statute seem to justify the view that they make it clearer that the language of the old statute was intended to reach schemes not embracing false and fraudulent representations or statements.

Moreover, unless this Court in the *Hammerschmidt case,* 265 U. S. 182, 188–189, had considered the *Horman case, supra,* as still effective, it would scarcely have commented upon it in the following language:

> The decision, however, went to the verge and should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose. Section 5480 has since been again amended to make its scope clearer.

Undoubtedly what this Court meant by its statement that the amendment of Section 5480 made "its scope clearer", was that there no longer existed any doubt that schemes to defraud must now be limited to such as inflict "pecuniary or property injury."

The Circuit Court of Appeals for the Sixth Circuit which decided the case at bar, has consistently adhered to its early ruling in the *Horman case* as disclosed in the following later cases, although the personnel of that court has entirely changed since the Horman decision:

> *Goldman* v. *United States,* 220 Fed. 57, 61.
> *Bettman* v. *United States,* 224 Fed. 819, 824.

Edwards v. *United States*, 249 Fed. 686, 689.

Only a word is necessary covering the contrary ruling in *Naponiello* v. *United States*, 291 Fed. 1008, relied upon by petitioner. The court there, in effect, overturns the ruling in the *Horman case, supra*, although this Court refused to issue a writ of certiorari in the latter case, and also apparently approved its ruling in the *Hammerschmidt case, supra*. In these circumstances the *Naponiello case* is not sufficient to justify this Court in issuing the writ of certiorari now prayed for, particularly, as hereinbefore pointed out, in the case at bar the jury was justified in finding that the threat involved was false, while the *Naponiello case* dealt with no such question.

III

It is respectfully submitted that the judgment below is correct and the petition should therefore be denied.

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DECEMBER, 1925.

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